A 15

Boys arm torn off. Company must pay.

17553

Judge Davis

Affirmed

Judge Dany

Court

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. ~~581~~ 305 99

THE UNION PACIFIC RAILROAD COMPANY, PLAINTIFF IN ERROR,

vs.

JESSE L. FORT.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEBRASKA.

FILED DECEMBER 18, 1871.

Oct. Term 1873

SUPREME COURT OF THE UNITED STATES.

No. 557.

THE UNION PACIFIC RAILROAD COMPANY, PLAINTIFF IN ERROR,

vs.

JESSE L. FORT.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEBRASKA.

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1 Pleas before the Hon. John F. Dillon, judge of the circuit court of the United States for the eighth judicial circuit and district of Nebraska at the November term, 1871.

JESSE L. FORT
vs.
UNION PACIFIC RAILROAD CO.

Be it remembered that, on the 10th day of March, 1870, there was filed in the said circuit court by and on behalf of the plaintiff above, a paper in words and figures following, to wit:

In the United States circuit court for the district of Nebraska.

JESSE L. FORT, PLAINTIFF,
v.
THE UNION PACIFIC RAILROAD COMPANY, defendant.

Said plaintiff, Jesse L. Fort, complains of said defendant, the Union Pacific Railroad Company, for that said plaintiff is a citizen of the State of Iowa, and that said defendant is a corporation created by and
2 existing under the laws of the United States, and having its principal place of business in the State of Nebraska, and being a citizen of said State of Nebraska.

Plaintiff further says that, on or about October 1st, A. D. 1867, plaintiff's minor son James H. Fort, then aged about sixteen years, was hired and employed by defendant to work in defendant's machine-shop in the city of Omaha, in the county of Douglas, within this district; that a portion of said shop and the machinery therein *was* under the superintendence and control of one Collett, whose first name is unknown, agent and servant of said defendant; that said Collett, being grossly negligent and careless in so doing, did order and direct, being thereto duly authorized by defendant, and said minor, as such employee, being under him as such superintendant, said minor to ascend to a great height, to wit, twenty feet from the floor of said shop, and among rapidly revolving and dangerous machinery, for the purpose of adjusting a certain belt by which a portion of said machinery was moved; that said undertaking was a hazzardous one even for an adult to perform; that said minor undertook to perform said order, but in attempting so to do, was caught by the right arm by said belt, said belt being
3 caught by a certain key which was improperly projecting from the shafting near which he was so directed to go, and said arm torn from his body; that said minor was guilty of no negligence or carelessness in attempting to discharge said order; but that he was compelled to obey all orders and directions of said Collett pertaining to his said employment.

Plaintiff further says that, by reason of said injury, said minor was prostrated and rendered utterly helpless for the space of three months thereafter, and that plaintiff was put to great expense for surgical and medical attendance upon his said minor son, the same being necessary by reason of said injury, to wit, $500.00.

That said minor has completely lost said arm, and is entirely unfitted thereby to work at any lucrative employment, and that, by reason thereof, plaintiff has suffered great damage, to wit, in the sum of three thousand dollars.

That plaintiff has suffered great damage, by reason of the premises in respect to the expense set out aforesaid in respect to his loss of said services as aforesaid, and also in respect to loss in his business, and in his suffering great mental anguish in consequence of said injury to his said son; all in the sum of 8,000.00.

4 Wherefore, plaintiff prays for a judgment against defendant for said sum of $11,500.00, and for costs of suit.

JOHN I. REDICK,
Pl'ff's Att'y.

UNITED STATES OF AMERICA,
State of Nebraska, County of Douglas, ss:

Jesse L. Fort, being first duly sworn, deposes and says that he is the plaintiff named in the foregoing petition, and he says that the facts therein set forth are true, as he believes.

JESSE L. FORT.

Subscribed in my presence and sworn to before me Feb'y 14th, 1870.
[NOTARIAL SEAL.] R. T. BEALL,
Notary Public.

Upon said paper, appear endorsements in words and figures following, to wit:

No. 3, B. U. S. circuit court. Jesse L. Fort v. U. P. R. R. Co. Petition. Filed March 10, 1870. Watson B. Smith, clerk. Clinton Briggs and John I. Redick, pl'ff's att'ys.

And afterwards, to wit, on the 10th day of March, A. D. 1870,
5 a summons was issued out of said court, which is in words and figures following, to wit:

THE UNITED STATES OF AMERICA,
District of Nebraska, ss:

The President of the United States of America to the marshal of the district of Nebraska, greeting:

You are hereby commanded to notify the defendant, The Union Pacific Railroad Company, that he has been sued by Jesse L. Fort in the circuit court of the United States for the district of Nebraska aforesaid, at Omaha; that, unless he answer by the 11th day of April, A. D. 1870, the petition of the said plaintiff against him, filed in the clerk's office of said court, such petition will be taken as true, and judgment rendered accordingly.

You will make due return of this summons on the 21st day of March, A. D. 1870.

Witness the Hon. S. P. Chase, Chief Justice of the Supreme Court of the United States, the 10th day of March, A. D. 1870, and in the 94 year of the Independence of the United States of America.

[SEAL.] Attest: WATSON B. SMITH, *Clerk.*

Upon said summons appears endorsements in words and figures following, to wit:

No. 3, B, United States circuit court, district of Nebraska. Jesse L.
6 Fort vs. Union Pacific Railroad Company; summons; amount claimed of the defendant by the plaintiff is $11,500 and costs of suit; returned and filed this 26th day of March, 1870; Watson B. Smith, clerk; Redick and Briggs, pl'ff's att'y'; marshal's fees, $2.06.

I certify that, on March 12th, 1870, I served the within writ by leaving a true copy of the same and the endorsements thereon with C. N. Mead, ass't gen'l superintendent of the Union Pacific Railroad, at the company's office in Omaha City.

J. T. HOILE, *U. S. Marshal*,
By JESSE TURNER, *Deputy*.

And afterwards, to wit, on the 11th day of April, A. D. 1870, a paper was filed in said cause, which is in words and figures following, to wit:

Demurrer.

In the United States circuit court for the district of Nebraska.

JESSE L. FORT, PLAINTIFF,
vs.
THE UNION PACIFIC RAILROAD COMPANY,
defendant.

And now comes the said defendant, and demurs to the petition of the plaintiff herein filed, and says that the said plaintiff ought not further to maintain his said action against the said defendant for the reasons following, to wit:

1st. It is apparent from said petition that the court has no jurisdiction of the person of the said defendant.

7 2nd. The said petition does not state facts sufficient to constitute a cause of action.

A. J. POPPLETON,
Att'y for Defendant.

Upon said paper appear endorsements in words and figures following, to wit:

No. 3 B; United States of America, State of Nebraska. In circuit court; Jesse L. Fort vs. U. P. R. Co.; demurrer. Filed April 11th, 1870. Watson B. Smith, clerk.

And afterward, to wit, on the 16th day of July, 1870, a paper was filed in said cause in words and figures following, to wit:

In United States circuit court for the district of Nebraska.

JESSE L. FORT, PLAINTIFF,
vs.
THE UNION PACIFIC RAILROAD COMPANY,
defendant.

1. The defendant, for answer to the petition in this action, says:

It denies that the defendant is a citizen of the State of Nebraska, but says that it is a citizen of the State of Massachusetts, having its principal office and place of business in that State, and says that this court has not jurisdiction of this action.

2. And for a further and separate answer it says:

8 It admits that the plaintiff's son and also the said Collett were in the service and were employees of the defendant at the time alleged in the petition.

It denies that the said Collett negligently or carelessly ordered or directed the said son of the plaintiff to ascend among dangerous machinery, or upon a hazardous undertaking, as alleged in the petition, or that he was guilty of any carelessness or negligence in the premises; and denies that the key therein mentioned was improperly projecting from the shafting, as alleged.

It denies that the defendant duly authorized said Collett to order and direct the plaintiff's said son, as alleged in the petition.

And as to all the averments of said petition not herein expressly admitted or denied, the defendant has no definite knowledge or reliable information, and therefore denies the same, and leaves the plaintiff to his proofs touching the same.

3. And for a further and separate answer, the defendant says that, at the time of the alleged injury to the plaintiff's said son, he and the said Collett were both servants and employees of the defendant, engaged in a common service and employment of defendant; and the said injury, if any, was received in and by reason of such common service and
9 employment; that the said Collett was a person careful and skilful in his said service and employment; and the defendant was not guilty of any negligence or carelessness in employing him or continuing him in said employment, or in any other particular in the premises.

A. J. POPPLETON,
Att'y for Def't.

STATE OF NEBRASKA, *Douglas Co., ss:*

Andrew J. Poppleton, being duly sworn, says that he is the attorney of the said defendant, The Union Pacific Railroad Company, and that he believes the facts stated in the above petition to be true, and that the reason the same is not verified by defendant is that it is a foreign corporation, not in said county or State.

ANDREW J. POPPLETON.

Subscribed in my presence, and sworn to before me, this 15th day of July, 1870.

[SEAL.]

GEO. M. O'BRIEN,
U. S. Commissioner, Dist. of Neb.

Upon said paper appears endorsements in words and figures following, to wit:

10 No. 3 B; United States circuit court; Jesse L. Fort, pl'ff, vs. The Union Pacific Railroad Company, def't; answer; filed July 16th, 1870; Watson B. Smith, clerk; A. J. Poppleton, att'y for def't.

And afterwards, to wit, on the 17th day of October, 1870, a paper was filed in said cause in words and figures following, to wit:

Reply.

In the circuit court of the United States in and for the district of Nebraska.

JESSE L. FORT
vs.
THE UNION PACIFIC RAILROAD COMPANY.

1. And now comes said plaintiff, and for his reply to defendant's answer herein says that he denies that defendant is a citizen of Massa-

chusetts, having its principal office and place of business in that State, as by defendant alleged, but avers the truth to be that defendant is a citizen of the State of Nebraska, and that this court has jurisdiction of this cause.

2. And for reply to the matter of defense numbered third in said answer, plaintiff says that he denies that said Collett and said minor were employed in a common service and employment of defendant, and
11 denies that said injury was received in and by reason of said common service, but avers the truth to be that said Collett was a superintendant and manager in said shop, and that plaintiff's said minor son was in subordination to said Collett as such, and subject to his authority; and that the said injury of said minor was received while said minor was acting under said Collett, so acting as such superintendant and manager, all as by plaintiff in his petition already alleged. And plaintiff denies every other fact and thing in said third defense set up. Wherefore plaintiff prays as he has already by his petition prayed.

JNO. I. REDICK,
Pl'ff's Attorney.

STATE OF NEBRASKA,
County of Douglas, ss:

Jno. I. Redick, being first duly sworn, deposes and says that, he is the att'y of the plaintiff in the foregoing reply, who is a non-resident of, and now absent from, the State of Nebraska; and affiant says the facts set forth in said reply are true, as he believes.

J. I. REDICK.

Subscribed in my presence and sworn to before me, this 15th day of Oct., 1870.

[SEAL.]

R. T. BEAL,
Notary Public.

12 Upon said paper appear endorsements in words and figures following, to wit:

No. 3. Doc. B. Jesse L. Fort vs. U. P. R. R. Co. Reply. Filed Oct. 17, 1870. Watson B. Smith, clerk. Jno. I. Redick, pl'ff's att'y.

And afterwards, to wit, on the 7th day of November, A. D. 1871, the following proceeding was had, as appears of record in said cause, in words and figures following, to wit:

JESSE L. FORT
vs.
THE UNION PACIFIC RAILROAD CO. } 1871, November 7. No. 3, B.

On this day this cause came on to be tried to a jury. Thereupon came:

1. F. W. KINNEY.
2. S. H. FOSSETT.
3. J. J. MCLAIN.
4. C. HARTMAN.
5. JNO. CADMAN.
6. CHA'S W. WHIPPLE.
7. S. P. SIBLEY.
8. T. SMITH.
9. HENRY JONES.
10. JOHN SHULER.
11. JAMES SLOCUM.
12. G. B. PATERSON.

good and lawful men, from the body of the circuit and district of Nebraska, who were duly empannelled and sworn to try the issue joined.

And the time having come for the adjournment of the court, and the trial of this case not being finished, the jury empannelled herein
13 were allowed to disperse until 10 o'clock a. m., to-morrow, after being duly instructed as to their duties by the court.

And afterwards, to wit, on the 8th day of November, A. D. 1871, the following proceeding was had, as appears of record in said cause, in words and figures following, to wit:

Trial continued.

JESSE L. FORT
vs.
UNION PACIFIC RAILROAD CO. } 1871, Novem. 8. No. 3, B.

On this day the trial of this cause was resumed, all the members of the jury empannelled and sworn to try the same, being present.

The time having arrived for the adjournment of the court, and the trial of this cause not being finished, the jury were allowed to disperse until 9 o'clock a. m. to-morrow, after being instructed as to their duties by the court.

And afterward, to wit, on the 9th day of November, A. D. 1871, the following proceedings were had, as appears of record in said cause, in words and figures following, to wit:

Trial concluded.

JESSE L. FORT
vs.
UNION PACIFIC RAILROAD CO. } No. 3, B.

The trial of this case was resumed this day, all the members
14 of the jury empannelled and sworn herein, being present.

The said jury having heard the evidence adduced, the arguments of counsel, and the charge of the court, retire' to their room to consider of their verdict. Thereupon the said jury returned into court and presented to the court their verdict, which is in words and figures following, to wit:

JESSE L. FORT
vs.
UNION PACIFIC RAILROAD CO. }

We find that the car department of the defendant was under the management of a general superintendent, who employed and dismissed the hands; that the shop, as to practical operations therein conducted, was under a foreman; that the employees were divided according to their work into sets with an under or immediate foreman; that one of these under foreman was Mr. Collett, named in the petition, under whom the plaintiff's son was to and did serve as a workman or helper, and whose orders he was to and did obey; that Collett had charge of running and superintending certain machinery in the shop.

We find that the plaintiff's son was injured in executing or carrying out an order of Collett, as described in the petition; that this
15 order related to a matter within the scope of Collett's duty and employment.

We find that the order to the plaintiff's son, (in carrying out which he lost his arm,) was one which was not within the scope of the son's duty and employment.

We find that it was not a reasonable one, and that its execution was attended with hazard to life or limb; and that a prudent man would not have ordered the boy to execute it.

J. CADMAN, *Foreman.*

We, the jury, find for the plaintiff the sum of three thousand and fifty-six and $\frac{58}{100}$ dollars, ($3,056$\frac{58}{100}$.)

J. CADMAN, *Foreman.*

If the plaintiff is only entitled to recover for damages down to March 10th, 1870, (date of suit commenced,) then the amount of damages and our verdict is the sum of ($2,264$\frac{92}{100}$) two thousand two hundred and sixty-four $\frac{92}{100}$ dollars.

J. CADMAN, *Foreman.*

Thereupon the attorneys for said defendant gave notice that they would file a motion for a new trial of said case.

And afterwards, to wit, on the 11th day of November, A. D. 1871, a paper was filed in said cause, which is in words and figures following, to wit:

In the circuit court of the United States, district of Nebraska.

16 JESSE L. FORT, PL'FF,
vs.
THE UNION PACIFIC RAILROAD COMPANY, DEF'T.

The defendant moves the court that the verdict in this action be set aside and vacated, and a new trial granted, because:

First. The verdict is not supported by sufficient evidence.

Second. The verdict is contrary to law.

Third. The damages found are excessive.

Fourth. Because of errors occurring in the trial and excepted to by defendant in the particulars following:

1st. In the receiving of evidence objected to by defendant.

2nd. In the rejection of evidence offered by defendant.

3rd. In the giving of instructions to the jury excepted to by defendant.

4th. In the refusal to give instructions asked by the defendant.

Nov. 11th, 1871.

A. J. POPPLETON,
E. WAKELY,
Att'ys for Def't.

17 Upon said paper appear endorsements in words and figures following, to wit:

In U. S. circuit court. No. 3 B. Jesse L. Fort, pl'ff, vs. The U. P. R. R. Co., def't. Motion for new trial.—Filed Nov'r 11, 1871. Watson B. Smith, clerk. Poppleton, Wakely, for def't.

And afterwards, to wit, on the 17th day of November, A. D. 1871, the following proceedings were had, as appears of record in said cause, in words and figures following, to wit:

Motion for new trial overruled.

JESSE L. FORT
vs.
UNION PACIFIC RAILROAD CO. } No. 3, B.

This cause came on to be heard this day, on the motion of said defendant, by Messrs. Poppleton and Wakely, its attorneys, for a new trial of the issues herein. Thereupon it was ordered by the court, the same being fully advised in the premises, that said motion for a new trial be, and the same is, overruled.

Judgment.

JESSE L. FORT
vs.
UNION PACIFIC RAILROAD CO. } No. 3, B.

On this day came said plaintiff, by Jno. I. Redick, his attorney, and asks the court for judgment on the verdict heretofore rendered on the trial of this cause. Thereupon it was ordered and adjudged by the court that said plaintiff, Jesse L. Fort, have and recover of and from
18 said defendant, The Union Pacific Railroad Company, the sum of ($3,056-58) three thousand and fifty-six $\frac{58}{100}$ dollars and his costs; the same to be taxed by the clerk of this court.

And afterwards, to wit, on the 24th day of November, A. D. 1871, a paper was filed in said cause, which is in words and figures following, to wit:

In the circuit court of the United States for the eighth judicial circuit and district of Nebraska.

JESSE L. FORT, PLAINTIFF,
vs.
THE UNION PACIFIC RAILROAD COMPANY, DEFENDANT.

Be it remembered that, at the November term, A. D. 1871, of the aforesaid court, the above-entitled action came on to be tried before the judges of the said court, Hon. John F. Dillon, circuit judge, presiding, and was tried upon the issues therein joined by a jury.

And thereupon the plaintiff, to maintain the issues upon his part, proved by witnesses that in May, 1867, he hired his infant son, then about sixteen (16) years old, to the defendant, to work in one of its machine-shops connected with the car-manufacturing business of defendant, at Omaha, in Nebraska, at two dollars (2.00) per day. No time was agreed upon, and it was understood that he could be at any time discharged.

19 That one Gambell was then superintendent of the works, who employed and discharged the hands.

That one Ballou was the general foreman over the whole shop, and one Collett, mentioned in the petition, was a "boss" or sub-foreman, having a set of men under his immediate direction control, and also having charge of and running and superintending the running of certain machinery.

That a portion of this machinery consisted of an iron turned shaft about forty feet long and 2 and ½ inches thick. Upon this shaft was a drum or pulley about three or four feet in diameter, over which ran a leather belt five or six inches wide and some twenty-five feet long, weighing about twenty-five or thirty pounds. The shaft was from fourteen to sixteen feet above the floor, and the belt, at its lower end, ran over a pulley, or some machinery near the floor, and some three or four feet from a perpendicular from the upper shaft.

That Collett also had special charge of a machine called a "sticker," used in making mouldings. That plaintiff's son was to work under Collett and obey his orders. That he worked principally at the sticker-machine, but not exclusively, his chief employment being to receive the mou'dings when they had passed through the "sticker" machine and lay them away. The contract of service between the plaintiff and the superintendent of the def't was verbal, and its nature and the
20 duties which the boy was to perform were stated to the jury.

It was proved that in October, 1867, the belt above mentioned was off the drum or pulley upon the shaft and needed lacing; that Collett thereupon directed plaintiff's son to go up a ladder nearly perpendicular, which was put up, and which rested against the shaft, then revolving about 175 to 200 times a minute, or against a frame just above the shaft, and hold the belt away from the shaft while Collett laced it at the lower end. That he held it a short time, when, in some way, the boy's arm got caught between the belt and shaft, and was instantly crushed and torn off; and afterwards amputated near the shoulder. There was evidence that this belt had no connexion with the "sticker"-machine at which the boy had chiefly worked under Collett; that this was the only time the boy had performed, or been asked to perform any similar service. There was no evidence that the boy was familiar with machinery.

The plaintiff also gave evidence to show the damages sustained in expense and loss of time and of the services of his son.

No evidence was given to sustain the averment that the accident arose from defective machinery, or from want of skill and experience on the part of Collett, or negligence of the defendant in employing
21 Collett; and it was admitted by plaintiff's counsel, upon the trial, that he did not seek to recover on the ground of Collett's general unfitness or unskilfulness.

Witnesses were also examined for the defendant, to maintain the issues on its part.

And thereupon, before the cause was submitted, the defendant requested the court to instruct the jury as follows:

"Upon the pleadings and proofs, the defendant is not liable for injuries to the plaintiff's son occasioned by the negligence of Collett." Which instruction the court refused to give, except as given in its charge; and to such refusal the defendant, by its counsel, did then and there duly except.

And the defendant, by its counsel, did further request the court to instruct the jury as follows:

"If the jury find that the plaintiff's son and Collett were, at the time the injury was received, in a common service of the defendant, and the injury was received in such common service, by reason of Collett negligently or imprudently ordering plaintiff's son to perform a hazardous service or act, in executing which the injury was received, this does not authorize a verdict for the plaintiff."

Which instructions the court refused to give, except as given in its

charge to the jury; and to such refusal the defendant, by its
22 counsel, did then and there duly except.

And the defendant, by its counsel, did further request the court to instruct the jury as follows:

"The defendant is not liable for injuries received by plaintiff's son, occasioned by the negligence of Collett, although he was in the defendants' service."

Which instructions the court refused to give, except as given in its charge to the jury; to which refusal the defendant, by its counsel, did then and there duly except.

And the defendant, by its counsel, did further request the court to instruct the jury as follows:

"The plaintiff cannot recover for services of his son which might have been rendered subsequent to the commencement of the action."

Which instruction the court refused to give, as asked, but modified the same as follows:

"The plaintiff cannot recover for services of his son which might have been rendered subsequent to the commencement of the action. (By the court.) He may recover for loss of service down to time of trial, if entitled to recover at all, so far as that loss of service is caused by the loss of the arm of his son."

And to the refusal of the court to give the same as asked, the defendant, by its counsel, did then and there duly except.

23 And the court thereupon did instruct the jury as follows:

In U. S. circuit court, Nebraska district, November T., 1871.

JESSE L. FORT
v.
UNION PACIFIC RAILROAD CO.

GENTLEMEN OF THE JURY:

I. This action is brought by the plaintiff to recover damages for an injury to his minor son, resulting in the loss of an arm, while in the employment of the defendant.

That the plaintiff's son was employed by the defendant, and that by an accident his arm was torn off by machinery in the car-shop of the defendant, are facts which are admitted. Evidence has been offered tending to show that the defendant in its works at this city (Omaha) had a car department, of which Mr. Gamble was the superintendent; that under him, and having immediate control in the shop, was a foreman, Mr. Ballou; that under the foreman there were various sets, or, as a witness called them, "gangs of men," under the immediate direction and control of some employee or "boss;" that among those having control of a set or gang of men working in the shop was a Mr. Collett,
(named in the petition;) that Collett's duty was to run and super-
24 intend the running of a certain machine or certain machinery in the shop; that from the time the plaintiff's son was employed, he had been working under Collett, obeying his orders and directions; that the chief employment of the son had been at a moulding-machine receiving and putting away mouldings as they came from the machine.

After the son had been thus engaged for some months, the evidence tends to show that on the day the accident in question happened, that a belt or band connected with the shaft (some 14 or 16 feet high) was off the drum or pulley and needed lacing. It does not very clearly ap-

pear, perhaps, whether the belt thus out of order belonged to the moulding-machine or some other machine near by; but there is evidence tending to show that it was within the scope of Collett's duty to see that it was repaired.

The plaintiff has given evidence, which has not on this point been opposed by any evidence produced by the defendant, that at the time of the accident, Collett wishing to lace the band at the end near the floor, ordered the plaintiff's son, about sixteen years of age, to ascend a ladder, resting on the shaft at the upper end, which shaft was revolving at the rate of 175 or 200 revolutions per minute, and hold or keep the band or belt away from the shaft while he, Collett, laced or sewed it together at or near the floor; and the right arm of the plaintiff's
25 son, while thus engaged pursuant to the orders of Collett, was caught or in some way became entangled in the belt or drawn between it and the shaft, and was instantly crushed to pieces and torn from his body.

The plaintiff has offered evidence tending to show that he hired his son to the defendant to work in the car-shop, making the contract with Mr. Gamble, the superintendent; that at the time Mr. Gamble went with the son into the shop and directed him, in Mr. Collett's presence, to help or work under Collett and obey his orders.

Upon the evidence, I do not understand it to be claimed by the plaintiff that the accident was caused by the defect in the key, (the only defect alleged in the pleadings as to the machinery;) and on the trial no question has been made as to Collett's general skill, fitness, and capacity for the performance of the functions or duties assigned to him, and the specific ground on which the recovery is claimed is that Collett, in ordering the plaintiff's son to ascend the ladder and perform the service before mentioned, considering the age of the boy and the nature of the service required of him, (which is claimed by the plaintiff to have been dangerous to life and limb,) was guilty of a wrongful and negligent act, which resulted in the injury to the boy, for which this action is brought.

26 II. There is no statute in the State of Nebraska relating to the liability of masters to servants, and the rules regulating such liability must be found in the general principles of the law as declared and settled by the courts.

One of these principles, too often decided to be now denied, is that a master is not liable to his servant or employee for the negligence of a fellow-servant, while engaged in the same common employment or service, unless he has been negligent in the selection of the servant in fault, which is a question, as before observed, not in this case; and this doctrine has been extended by many courts to all persons serving the same master, and under his control, whether equal, inferior, or superior in grade to the person or servant injured; and the fact that the injured servant was under the control of the servant by whose negligence the injury was caused, has been considered to make no difference in the application of the rule. Although the rule, particularly this extension of it so as to exempt a master for the negligence of a servant in the scope of his employment, who has the control of another servant, for an injury to the latter, caused by his obeying the orders of his superior, has met with much, and I must say, in my judgment, just and reasonable opposition, yet it has been so often and so generally decided, that it is doubtful whether or how far a court, whatever may be its con-
27 victions, is at liberty to disregard it. But I do feel free to refuse to extend the rule to cases to which the reason on which it rests does not apply.

The reason of the doctrine is that a servant or employee, in making his contract, must be presumed to take into account all the ordinary risks of the business or work on which he proposes to enter, and obtains a compensation which, upon the average, covers these risks; among which are included the negligence of fellow-servants in the same employment; but he is not presumed to take into account a risk not included in his employment, and which, therefor', he has no reason to anticipate.

In deciding this case you should determine the nature of the employment on which the plaintiff engaged that his son should serve. If you find that his contract of service or the duties which he engaged to perform were such that it was within the contract or within the scope of those duties, that the son should assist in the repair of the machinery in question and that the son when injured was in the discharge of a duty or service covered by the contract of employment, then the company is not liable for the negligence of Collett (if he was negligent) with respect to ordering the son to ascend the ladder and hold the belt away from the shaft.

28 [But I draw this distinction: if the work, which the son was ordered by Collett to do, was not within the contract of service, was not one of the duties which fell within the contract of employment, but was outside of it, then Collett, in ordering the service in question (if he was in the scope and course of his duties and power at the time) must, as to this act, be taken to represent the company, (which is presumed to constructively present;) and if that act was wrongful and negligent, as hereinafter defined, the company, his employer, would be liable for the damages caused by such negligent and wrongful act; and the principle before adverted to, that the master is not liable for the neglect of a co-employee in the same service, has no application, or no just application to such a case; for in such a case they are not, in my judgment, in any proper sense "fellow-servants in the same common service."]

This part of instructions, included in brackets, is excepted to by defendant.

III. This action is based essentially upon the alleged negligence of Collett, and the negligence imputed consists in the nature of the order which he gave the plaintiff's son. If, under the foregoing instructions, you find that the company is liable in respect of the act of Collett in ordering the boy up to the shaft, you will then have to enqnire whether that act was wrongful and negligent.

Now, gentlemen, that depends upon the circumstances of the case, which you should attentively consider.

29 An employer is not an insurer of the lives and limbs of his men; but he does impliedly engage that he will not expose them to unnecessary and unreasonable risks to life or serious bodily injury.

Negligence is the omission to do something which a reasonable, prudent man, guided by those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do, under all the circumstances surrounding and characterizing the particular case. And in this case it is the duty of the jury to consider the age, and experience, and extent of judgment of the boy, and the nature of the service demanded of him in respect to its being hazardous to life or limb, or otherwise.

If a reasonable and ordinarily-prudent man would not have ordered a boy of his age, under the circumstances, upon such a service because it was dangerous, then it was a negligent and wrongful act; but if it could not, by a man of reasonable prudence and sagacity, have been foreseen that the service demanded was perilous, the company is not

liable, although the act required of the boy was one not falling with' the scope of his employment.

30 IV. This is an action by the father for loss of service of the son, and under the pleadings he can only recover pecuniary damages, which include actual or necessary expenditures for supplies for the son during his recovery; the value of his and his family's necessary attention to the son; and the value of the loss of the services of the son from the date of the accident down to the time of trial.

The instructions that plaintiff recover for services of his son that might have been rendered subsequent to commencemnnt of the action, and to time of trial, excepted to by defendant.

JNO. F. DILLON,
Circuit Judge.

The defendant, at the time, excepted to the following portion of the aforesaid charge, to wit: "But I draw this distinction: if the work which the son was ordered by Collett to do was not within the contract of service, was not one of the duties which fell within the contract of employment, but was outside of it, then Collett, in ordering the service in question (if he was in the scope and course of his duties and power at the time) must, as to the act, be taken to represent the company, (which is presumed to be constructively present;) and if that act was wrongful and negligent, as hereinafter defined, the company, his employer, would be liable for the damage' caused by such negli-

31 gent and wrongful act; and the principle before adverted to, that the master is not liable for the neglect of a co-employee in the same service, has no application, or no just application to such a case; for in such a case they are not, in my judgment, in any proper sense 'fellow-servants in the same common service.'"

To the giving of which instruction the defendant, by its counsel, did then and there duly except.

And thereupon, the jury having retired to consider of their verdict, returned into court on the 9th day of November, A. D. 1871, a general verdict for the plaintiff in the sum of $2,264.92, if his damages be computed only to the date when this suit was brought, March 10th, 1870; but in the sum of $3,056 58, if damages be estimated down to the time of the trial, November 10th, 1871, which said verdicts are of record. And the jury found the following special verdict as to the nature of Collett's employment and that of the plaintiff's son, and the cause of the injury, to wit:

32 We find that the car department of the defendant was under the management of a general superintendent, who employed and dismissed the hands; that the shop, as to practical operations therein conducted, was under a foreman; that the employees were divided, according to their work, into sets, with an under or immediate foreman; that one of these under foreman was Mr. Collett, named in the petition, under whom the plaintiff's son was to and did serve as a workman or helper, and whose orders he was to and did obey; that Collett had charge of running and superintending certain machinery in the shop.

We find that the plaintiff's was injured in executing or carrying out an order of Collett, as described in the petition.

That this order related to a matter within the scope of Collett's duty and employment.

We find that the order to the plaintiff's son (in carrying out

33 which he lost his arm) was one which was not within the scope of the son's duty and employment.

We find that it was not a reasonable one, and that its execution was attended with hazard to life or limb, and that a prudent man would not have ordered the boy to execute it.

J. CADMAN, *Foreman.*

And on the 16th day of November, A. D. 1871, the motion of the defendant that the verdict be set aside and vacated, and a new trial be granted, came on to be heard, and was argued; whereupon the court overruled the same. And to said decision and ruling of the court the defendant, by its counsel, then and there duly excepted. And thereupon it was ordered that judgment for the plaintiff be entered upon the said verdict for the sum of three thousand fifty-six $\frac{58}{100}$ ($3,056 58) dollars, to which ruling and decision of the court the defendant, by its counsel, then and there duly excepted.

34 And because the said several exceptions do not appear of record, I do, on this 21st day of November, A. D. 1871, during the said term of court, sign and seal this bill of exceptions at the request of counsel for defendant.

JOHN F. DILLON, [SEAL.]
Circuit Judge.

Upon said paper appear endorsements in words and figures following, to wit:

No. 3, B. Fort v. U. P. R. R. Co. Bill of exceptions. Filed November 24th, 1871. Watson B. Smith, clerk.

And afterwards, to wit, on the 29th day of November, A. D. 1871, a paper was filed in said cause, which is in words and figures following, to wit:

Know all men by these presents: That we, The Union Pacific Railroad Company, as principal, and A. J. Poppleton and T. E. Sick-

35 les, as sureties, are held and firmly bound unto Jesse L. Fort in the full and just sum of eight thousand dollars, ($8,000,) to be paid to the said Jesse L. Fort, his certain attorney, executors, administrators, or assigns. To which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents, sealed with our seals, and dated this twenty-ninth day of November. A. D. one thousand eight hundred and seventy-one.

Whereas lately at the November, A. D. 1871, term of the circuit court of the United States for the eighth judicial circuit and district of Nebraska, in a suit depending in said court between Jesse L. Fort, plaintiff, and the Union Pacific Railroad Company, defendant, judgment was rendered against the said Union Pacific Railroad Company, and the said Union Pacific Railroad Company, having obtained a writ of error and filed a copy thereof in the clerk's office of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said Jesse L. Fort, citing and admonishing him to be and appear at a Supreme Court of the United States to be holden at Washington on the first Monday of December next:

Now, the condition of the above obligation is such that if the said Union Pacific Railroad Company shall prosecute its appeal to

36 effect and answer all damages and costs if it fail to make its plea

good, then the above obligation to be void, otherwise to remain in full force and effect.

THE UNION PACIFIC RAILROAD COMPANY.
By A. J. POPPLETON, [SEAL.]
Its Attorney in fact and in this cause.
A. J. POPPLETON, *Surety.* [SEAL.]
T. E. SICKLES, *Surety.* [SEAL.]

Sealed and delivered in presence of—
L. BURNHAM.

Approved by—
29 Nov., 1871. Approved as to form and security.
ELMER S. DUNDY, *Judge.*

Upon said paper appears endorsements in words and figures following, to wit:

No. 3 B, United States circuit court, district of Nebraska. The Union Pacific Railroad Company, plaintiff in error, *v.* Jesse L. Fort, defendant in error. Supersedeas bond. Filed November 29th, 1871. Watson B. Smith, clerk.

And afterwards, to wit, on the 29th day of November, A. D. 1871, a writ of error was allowed by said court as follows, to wit:

37 UNITED STATES OF AMERICA,
District of Nebraska, ss:

The President of the United States of America to the honorable the judges of the circuit court of the United States for the district of Nebraska, greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court, before you, between Jesse L. Fort, plaintiff, and the Union Pacific Railroad Company, defendant, a manifest error hath happened, to the great damage of the said defendant in the said cause, as by its complaint appears.

We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the third Monday of December next, in the said Supreme Court to be then and there held; that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein, to correct that error, what of right and according to the laws and custom of the United States, shall be done.

Witness the Honorable Salmon P. Chase, Chief Justice of the said Supreme Court of the United States, at Omaha, in said district, this 29th day of November, 1871.

[SEAL.] WATSON B. SMITH, *Clerk.*

Allowed by—

ELMER S. DUNDY, *Judge.*

38 (Indorsed:) No. 3, B. United States circuit court, district of Nebraska. The Union Pacific Railroad Co., pl'ff in error, *vs.* Jesse L. Fort, def't in error. Writ of error.

39 Thereupon, afterwards, to wit, on the 29th day of November, A. D. 1871, a citation was issued by the judge of said court, as follows, to wit:

THE UNITED STATES OF AMERICA,
District of Nebraska, ss:

To Jesse L. Fort, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the third Monday of December next, pursuant to a writ of error, filed in the clerk's office of the circuit court of the United States for the district of Nebraska, wherein the Union Pacific Railroad Company is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Salmon P. Chase, Chief Justice of the Supreme Court of the United States, at Omaha, this twenty-ninth day of November, 1871.

[SEAL.] ELMER S. DUNDY, *Judge.*

40 UNITED STATES OF AMERICA,
District of Nebraska, ss:

Joseph T. Hoile, United States marshal for the district of Nebraska, being first duly sworn, deposes and says, that on the 30th day of November, A. D. 1871, he served a certified copy of the within citation, with the endorsements thereon, upon John I. Redick, attorney for the within-named Jesse L. Fort, defendant in error, in Douglas Co., Nebraska, in person.

J. T. HOILE,
U. S. Marshal.

Subscribed in my presence, and sworn to before me, this 4th day of December, 1871.

WATSON B. SMITH, *Clerk.*

(Indorsed:) No. 3, B. United States circuit court, district of Nebraska. Union Pacific Railroad Co., pl'ff in error, *vs.* Jesse L. Fort, def't in error. Citation. Filed December 4th, 1871. Watson B. Smith, clerk. Marshal's fees, $2.06.

41 UNITED STATES OF AMERICA,
District of Nebraska, ss:

I, Watson B. Smith, clerk of the circuit court of the United States for the district of Nebraska, do hereby certify that the foregoing is a true and faithful transcript of all pleadings, orders, process, and proceedings in the case of Jesse L. Fort *vs.* The Union Pacific Railroad Company, of record and on file in my office as said clerk, and the whole thereof, and the endorsements thereon; and that a copy of the writ of error and citation herein has been lodged and remains in my office.

Witness my hand and the seal of said court, at Omaha this 8th day of December, A. D. 1871.

WATSON B. SMITH, *Clerk.*

Costs of this transcript p'd by def't, $8.85.

(Indorsement on cover:) No. 557. The Union Pacific Railroad Company, plaintiff in error, vs. Jesse L. Fort. Nebraska, C. C. U. S. Filed 18 December, 1871.

Supreme Court

OF THE UNITED STATES.

THE UNION PACIFIC RAILROAD COMPANY,
Plaintiff in Error,

vs.

JESSE L. FORT,
Defendant in Error.

BRIEF OF PLAINTIFF IN ERROR.

Statement.

This was an action to recover for personal injuries, alleged to have accrued to a son of the defendant in error, by the loss of an arm, while working in a machine shop of the plaintiff in error, and by reason of its negligence.

The petition alleged in substance, that James H. Fort, a minor son of the plaintiff below, aged 16, was employed in defendant's machine shop; that certain machinery therein was under the control of one Collett, a servant of defendant; that plaintiff's son was

under said Collett as superintendent; that said Collett, being thereunto authorized by defendant, negligently and carelessly ordered plaintiff's son to ascend by a ladder to a certain shaft, for the purpose of adjusting a belt, by which the machinery was run. That in performing said service, plaintiff's son was caught by said belt, by reason of a certain key improperly projecting from the shaft, to which he was ordered to ascend, and his right arm torn off. That the performance of such order was hazardous, and that the plaintiff's son was guilty of no negligence in the attempted performance of said order, but that he was compelled to obey the orders and directions of Collett pertaining to his (plaintiff's son) employment.

Rec. fol. 2 and 3.

The answer denied the allegations of the petitioner, except that both, said Collett and defendant's son, were employees of defendant, at the date of the injury alleged.

The answer, as a further defense, alleged that at the date of the alleged injury, both the plaintiff's son and Collett were fellow-servants of defendant, engaged in a common employment; that said injury was received in and by reason of such common service; that said Collett was a careful and skillful person, and the defendant was not guilty of any negligence or carelessness in employing him or continuing him in said employment, or in any other particular.

Rec. fol. 8 and 9.

Plaintiff's reply denied that Collett and plaintiff's son were engaged in a common service, and that the injury was received therein, and alleged that Collett was the superintendent and manager of the machine shop, and that plaintiff's son was subordinate to Collett and subject to his authority, and that the injury was received while plaintiff's son was acting in such subordinate capacity—in the performance of his duty.

Rec. fol. 11.

It appears from the bill of exceptions (Rec. fol. 19, 20, 21, 22, 23,) that no evidence was given to sustain the allegation that the accident was caused by defective machinery, or by the "key" mentioned in the petition, as improperly projecting from the shaft, or from want of skill and experience in Collett, or the negligence of defendant in employing Collett or continuing him in its employment, and the plaintiff admitted that he did not seek to recover on these grounds. The recovery was claimed on this ground only, viz : that Collett, in ordering plaintiff's son to perform the service, in rendering which he was hurt, was guilty of a wrongful and negligent act, for which the defendant was liable.

The Court, among other things, instructed the jury (Rec. fol. 28), if the work which the son was ordered by Collett to do, was not within the contract of service, then Collett, in ordering the service in question (if within the scope of his duty and authority at the time) must, as to this act, be taken to represent the Company, (which is presumed to be constructively present), and if that act was wrongful and negligent, the Company would be liable for the damages caused, and the principle that the master is not liable for the neglect of a co-employee, in the same service has no application to the case.

To the foregoing instruction defendant excepted.

There is no statute of the State of Nebraska (in which the accident happened) relating to the liability of masters to servants. Such liability can only be derived from the general principles of law as established by judicial decisions.

The jury, by direction of the Court, found a special verdict as follows :

"We find that the car department of the defendant "was under the management of a general superinten- "dent, who employed and dismissed the hands ; that "the shop, as to practical operations therein conduc- "ted, was under a foreman ; that the employees were

"divided, according to their work, into sets, with an "under or immediate foreman; that one of these un- "der foremen was Mr. Collett, named in the petition, "under whom the plaintiff's son was to and did serve "as a workman or helper, and whose orders he was "to and did obey; that Collett had charge of running "and superintending certain machinery in the shop.

"We find that the plaintiff's son was injured in ex- "ecuting, or carrying out, an order of Collett, as des- "cribed in the petition.

"That this order related to a matter within the "scope of Collett's duty and employment.

"We find that the order to the plaintiff's son (in "carrying out which he lost his arm), was one which "was not within the scope of the son's duty and em- "ployment.

"We find that it was not a reasonable one, and that "its execution was attended with hazard to life and "limb, and that a prudent man would not have or- "dered the boy to execute it."

ASSIGNMENT OF ERRORS.

I.

The Court erred in refusing to give the following instructions asked for by the defendant: "Upon the "pleadings and proofs, the defendant is not liable for "injuries to the plaintiff's son, occasioned by the neg- "ligence of Collett."

II.

The Court erred in giving the following instructions, (Rec. fol. 28).

"But I draw this distinction: if the work, which the "son was ordered by Collett to do, was not within the "contract of service, was not one of the duties which

"fell within the contract of employment, but was out-
"side of it, then Collett, in ordering the service in
"question (if he was within the scope and course of
"his duties at the time) must, as to this act, be taken
"to represent the Company (which is presumed to be
"constructively present;) and if that act was wrong-
"ful and negligent as hereinafter defined, the Com-
"pany, his employer, would be liable for the damages
"caused by such negligent and wrongful act; and the
"principle before adverted to, that the master is not
"liable for the neglect of a co-employee in the same
"service, has no application or no just application to
"such a case; for in such a case they are not, in my
"judgment, in any proper sense 'fellow servants in
"the same common service.'"

The rule is, in the absence of statutory enactment, settled both in England and in this country, that the master is not liable to his servant for injuries accruing to him by reason of the negligence of a fellow-servant engaged in a common employment, save in the following excepted cases. 1. When the master has been guilty of negligence in hiring an unskillful and careless servant. 2. Or when, having exercised due diligence and care in hiring, the master has continued the servant in his employment after knowing or having abundant opportunity to ascertain his unskillfulness or carelessness. 3. When the master has knowingly provided defective material and machinery for the use of his servant, or having, without knowledge, provided such defective materials and machinery, has continued the use of them after being apprised of their true character.

Mich. Cent. R. R. Co. v. Leahey, 10 Mich., p. 199, and cases cited.
Farrell v. Boston & Wor. R. R. Co., 4 Met. 49.
Hayes v. Western R'y Co., 3 Cush. 270.
Warren v. Erie R'y Co., 39 N. Y., 468.
Carles v. B. & P. R. R. Co., 43 Maine, 269.
Wegen v. Pa. R. R. Co., 55 Pa., 460.

31 N. Y. 293, 32 Ver. 473, 29 Conn. 548, 20 Md. 212. 11 Iowa, 426.

The only States which have shown an inclination to relax this rule are Ohio, Kentucky, Indiana, and Wisconsin, and in these the principle of the rule does not seem to be shaken. Its modifications in these States arises from their rulings as to what constitutes fellow-servants, engaged in a common employment. In that particular only are the decisions of the Courts in those States in conflict with cases above cited.

20 Ohio, 415 ; 22 Ind., 26 ; 18 Wis., 700.

The Court, in instructing the jury, conceded the rule to be settled as above stated, but sought to incorporate into it an exception which is believed to be without any precedent whatever, and in conflict with certain established principles, regulating the relation in question.

First Point.

It being alleged in the petition (Rec. fol. 3,) that in performing the service in which the accident occurred, the plaintiff's son was acting under the orders of Collett, and was bound by his contract of service to obey such orders, because within the scope of the duties of his employment it was error to submit the question whether the act ordered by Collett was within the scope of the duty and employment of plaintiff's son. The first instruction asked by defendant should rather have been given, (Rec. fol. 21).

The petition was manifestly drawn upon the theory that the liability resulted from the negligence of Collett, in ordering the plaintiff's son upon the service in question, *he being obliged to obey the order—and the accident being caused by defective machinery, viz:* "a certain key improperly projecting from the shafting."

The allegation of the petition is positive "that the plaintiff's son was compelled to obey all orders and directions of Collett pertaining to his said employment." The plaintiff could only succeed upon the allegations of his petition, and his proofs must be applicable thereto.

After the evidence was taken, the record shows that the plaintiff abandoned the theory and allegations of his petition. He admitted the general skill and prudence of Collett, that defendant was guilty of no negligence in employing him, and also admitted the perfection of the machinery—but in flat contradiction of his petition, denied that the boy was obliged to obey Collett's orders in the service in question. He thereupon sought to deduce defendant's liability from that fact alone, (Rec. fol. 20). In other words, he sought to predicate the liability of the defendant upon alleged affirmative proof of a fact which he had negatived by the allegations of his own petition, and the Court submitted it as a question of fact, to be found by the jury, in flat contradiction of plaintiff's own affirmative allegation (Rec. fol. 28). The jury found against such allegation, and upon such finding the judgment rests.

It is error to submit to the jury, as contested and as susceptible of an affirmative finding an alleged fact, the existence of which is positively negatived by a sworn allegation of plaintiff's petition.

In the case of Tobey v. Reed, (9 Conn., 216), the point was directly presented, whether it was error for the Court to submit to the jury as contested an alleged fact, sworn to by a witness for the plaintiff, and admitted by the defendant.

The Court below instructed that the fact was proved if the jury believed the witness. Held that as the attention of the jury was not withdrawn from the admission, it was not error.

In the case at bar the Court submitted, and the jury found affirmatively an issue (whether in ascending the ladder and holding the belt away from the

shaft, the boy was within the scope of his duty and employment) which was negatived by a positive allegation of plaintiff's petition—as applying to which no proof was offered and none was applicable.

In 3d Graham & Waterman, on New Trials, page 831, the author says: "If the attention of the jury be so far withdrawn from a material admission that they lose sight of it altogether; and on weighing the testimony on the point, find adverse to it, the consequence of the instruction will be a verdict against evidence, and if complete justice has not been done a new trial will be granted. But if the charge leave the admission in full force, to be considered with the rest of the testimony, it can not justly be the subject of complaint, though the Judge may have instructed the jury that if they believe the point they will find accordingly. Such a charge, however, would be irregular, and its tendency would be to mislead. If the point was admitted, it was no longer the subject of dispute. The attention of the jury should not therefore be directed to it as though it was contested; to do so, would be manifestly unfair toward the party in whose favor the admission was made."

That such admission of a point not contested by the defendant, and positively alleged in plaintiff's petition, as applicable to which no proof was offered, operated as a surprise and to prejudice the defendant, seems too plain for argument. Had the allegation been the reverse, defendant might have contested it and produced its proofs, but being willing to accept it as made, he learns for the first time, after the trial is closed, and when it is too late to offer proof, that the Court submits it to the jury as a contested fact. And the jury, following the Court, find upon an uncontroverted averment, made by the plaintiff, in direct opposition to the plaintiff's allegations under oath.

The question, whether the boy in the service in question, was within the scope of his employment, being thus withdrawn by the petition, and not properly

submitted to the jury—there was absolutely nothing to go to the jury—and the Court should have given the instructions asked by the defendant, viz: "Upon the pleadings and proofs the defendant is not liable for injuries to the plaintiff's son, occasioned by the negligence of Collett."

It is, therefore, respectfully submitted, the refusal to give this instruction was error.

Second Point.

Assuming that the submission and finding was correct, and that the service in question was without the scope of the boy's duty and employment, the plaintiff's son was in the position of a mere volunteer, and thus subject to the ordinary rule in respect to injury by negligence of fellow-servants engaged in a common employment.

If ascending the ladder and holding the belt away from the shaft was outside the boy's duties, then he was at liberty, when directed by Collett, to refuse to perform it. He was under no obligation to enter upon it, and having voluntarily chosen to do it, he is in the same position as a bystander who should assist at the request of the Company's servant.

A volunteer, assisting at the request of the master's servant, assumes the character of a fellow-servant, and the master is not liable for injury arising from negligence of fellow-servants.

Degg v. Midland R. R. Co. 40 English Law and Equity Rep., 376.

It makes no difference that plaintiff's son was a minor, 16 years of age.

King v. B. & W. R. R. Co., 9 Cush. 113.

It was error to instruct the jury (Rec. fol. 28) if the work which the son was ordered by Collett to do, was

not within the contract of service, but was outside of it, then Collett, in ordering the service in question (if he was within the scope and course of his duties and powers at the time) must, as to this act, be taken to represent the Company (which is presumed to be constructively present).

It was conceded by both parties that Collett was simply the "Boss," or foreman, of a gang of hands (of which the boy was one) which was under his direction, in the performance of their duties. There was over him a superintendent (Gamble) of the entire car works, and a foreman of the machine shop, (Ballou) in which Collett worked. No claim was made that Collett had any general power to represent the Company, or that he had authority to either hire or discharge hands or fix their duties. On the contrary, Gamble, the superintendent, hired all the men, including this boy. He set him to work, prescribed his duty, and it is believed must alone be regarded as the representative of the Company in the car works.

Collett was clothed with no discretion in hiring, discharging, or assigning to duty. He was a mere superintendent of a particular kind of work and machinery, hired and assigned to his duty as the boy was, by Gamble. He could not, therefore, in any sense, be said to represent the Company as constructively present.

The case of Murphy v. Smith, 19 Common Bench, New Style, p. 361, it is submitted decides this very question.

The defendant was the proprietor of a match manufactory; one Simlack was superintendent or manager. Under him was Debor, who, in Simlack's absence, managed the establishment. The plaintiff had been hired by Simlack. The plaintiff was set to stir a compound—liable to explosion when not skillfully done—with a stick, and in the presence of Debor.

The Court submitted to the jury whether the acci-

dent was caused by the negligence of Debor, and whether he was at the time acting as manager of the establishment.

The jury answered both questions in the affirmative.

The Court, in its opinion, says :

" This is an action to recover damages for an injury " sustained by the plaintiff through an explosion of " certain combustible materials in the defendant's fac- " tory. It appears that the plaintiff, a boy of tender " years, was engaged in stirring the mixture, in a ves- " sel, in the presence of Debor ; and, according to the " evidence, Debor was clearly guilty of negligence in " permitting an inexperienced person to do this, and " would have been liable. But the action is brought " against Debor's master ; and the question for our " determination is, whether the master is responsible ; " the law being clear that a damage caused to a work- " man, by reason of the negligence of a fellow-work- " man, imposes no liability upon the master. * * * " The question is, whether Debor is to be considered " the vice-principal of the factory. I avoid the word " manager," which is an ambiguous one, and may " mean either a person retained generally to represent " the principal in his absence, or one who has the su- " perintendence of a particular contract or job, in which " latter case he would be in no different position from " that of a fellow-workman. * * * * Assuming " that Debor was the person whose negligence caused " this accident, is the master responsible ? There was " evidence for the jury that Simlack was placed by " the defendant in the position of a vice-principal. If " the case had rested there I should have been in- " clined to think that the verdict ought to stand. The " contract for the plaintiff's service was made with " Simlack. Debor was a workman, whose duty it was " to mix the material which exploded. Was there any " evidence to fix the defendant as having put Debor to " represent him at the factory ? The evidence on the " subject is the statement of the plaintiff, who said

"that Simlack was the foreman of the works; and "that, when Simlack was away Debor took his place. "Is there any evidence that Debor was a person ap- "pointed to represent the defendant? The only oth- "er evidence, was, that, at the time the explosion took "place, Simlack was not at the factory, and Debor "was. Is there any evidence that Debor had the au- "thority I speak of? For aught that appears Sim- "lack might have been at another part of the premi- "ses at the moment. Upon the whole, I am clearly "of the opinion that the accident was the result of "Debor's negligence, and that he is not shown to have "filled any other position in relation to the plaintiff "than that of a fellow-workman."

It is, therefore, respectfully submitted that for the reasons above stated, the judgment of the Court below should be vacated and the case remanded.

A. J. POPPLETON,

OF COUNSEL FOR PLAINTIFF IN ERROR.

UNION PACIFIC R. R. CO.,
Plaintiff in Error.
vs.
JESSE L. FORT,
Deft in Error.

IN THE SUPREME COURT OF THE UNITED STATES.

ARGUMENT FOR DEFENDANT IN ERROR.

The principal question in the case is whether the Company is liable for the consequences resulting to defendant's son, while he was acting under the orders of Collett, in holding the band mentioned in evidence. Collett and the boy were both servants of the company, but in different grades of employment, the latter being subject to the orders and control of the former. The testimony tended to show that lacing the alleged belt and keeping the machinery in order were a part of the duties which the Company had imposed on Collett. The boy, being subject to his orders, obeyed the order given him to ascend a ladder to great hight, amid rapidly revolving and dangerous machinery, and there in executing of the order his arm was torn from his body. This service was not within the scope of his employment, but he was hired to work at a moulding machine. The father did not contemplate when he engaged his sons services to the Company, that he would be called upon to perform the dangerous service before mentioned; that is, the jury had the right to find this from the evidence.

While many authorities seem to relieve the master from liability in cases where one fellow servant sustains injuries through the negligent acts of another, yet we have several cases which modify and restrict the application of the rule to cases where the injury complained of was occasioned by servants in a common employment. The distinction is this: that where the servant is injured through the negligence of one who is in authority over him, and the injury results while the former is acting under the orders of the latter, then the master is liable for the negligence of the supervisor.

C. C. C. R. R.: vs. Keary, 3, Ohio Stat. 202, and authorities then cited. The same doctrine seems to be held in Kentucky and Georgia. Also the Scotch Courts hold this modified rule.

The learned Judge before whom this cause was tried, in his charge to the jury, did not feel at liberty to adopt the modified rule, to its full extent, but he left it for the jury to say from the evidence, whether it was, or was not negligence for Collett to order the boy to perform the dangerous service which resulted so disastrously to him. His youth was perhaps a controling circumstance in favor of the right of recovery. A man of ordinary intelligence would either have declined to obey the orders of Collett, or if he obeyed he would have had sufficient strength and judgment to perform the service without much risk of injury. It will be borne in mind that Gamble, the Superintendent of one of the departments of the Company's business, engaged the services of the boy, making the contract with his father, and that Gamble placed him under the orders of Collett, and it seems to have been understood by all parties that the duties the boy was to perform, consisted in receiving and putting away mouldings as they came from a machine. Gamble should have entrusted the boy to the control of a careful and prudent man, not doing this, the Company must be held answerable for the consequences. For the father had the right to presume, when he made the contract of service, that the Company would not expose his son to risks of life and limb.

We ask that the judgment of the Court below be affirmed.

JOHN I. REDICK, and
CLINTON BRIGGS,
Att'ys for Defendant in Error.